

Bong (Migration) [2017] AATA 1854 (3 October 2017)

DECISION RECORD

DIVISION:	Migration & Refugee Division
APPLICANT:	Ms May Bong
CASE NUMBER:	1619797
DIBP REFERENCE(S):	BCC2015/2763214
MEMBER:	Michelle East
DATE:	3 October 2017
PLACE OF DECISION:	Perth
DECISION:	The Tribunal remits the application for a Partner (Temporary) (Class UK) visa, with the direction that the applicant meets the following criteria for a Subclass 820 (Partner (Temporary)) visa: • cl.820.211(2) of Schedule 2 to the Regulations • cl.820.221 of Schedule 2 to the Regulations

Statement made on 03 October 2017 at 10:53am

CATCHWORDS

Migration – Partner (Temporary) (Class UK) visa – Subclass 820 (Partner) – Genuine relationship – Continuing relationship – Emotional commitment - Pregnancy

LEGISLATION

Migration Act 1958, ss 5F, 65, 360

Migration Regulations 1994, r 1.15A, Schedule 2, cl 820.211, 820.221

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. This is an application for review of a decision of a delegate of the Minister for Immigration on 11 November 2016 to refuse to grant the applicant a Partner (Temporary) (Class UK) visa under s.65 of the *Migration Act 1958* (the Act).
2. The applicant applied for the visa on 18 September 2015 on the basis of her relationship with her sponsor. At that time, Class UK contained only one subclass: Subclass 820 (Partner (Temporary)). The criteria for the grant of this visa are set out in Part 820 of Schedule 2 to the Migration Regulations 1994 (the Regulations). The primary criteria must be satisfied by at least one applicant. Other members of the family unit, if any, who are applicants for the visa need satisfy only the secondary criteria.
3. The delegate refused to grant the visa on the basis that the visa applicant did not satisfy cl.820.211 because the delegate was not satisfied the applicant and her sponsor were in a genuine spousal relationship.
4. The applicant was represented in relation to the review by her registered migration agent.
5. Substantially more information was available to the Tribunal than was before the delegate. In reaching its decision, the Tribunal did not consider a hearing to be necessary as it was able to find in favour of the visa applicant on the basis of the material before it, pursuant to s.360(2)(a) of the Act.
6. For the following reasons, the Tribunal has concluded that the matter should be remitted for reconsideration.

CONSIDERATION OF CLAIMS AND EVIDENCE

7. The issue in the present case is whether the applicant is the spouse of the sponsor within the meaning of s.5F of the Act.

WHETHER THE PARTIES ARE IN A SPOUSE OR DE FACTO RELATIONSHIP

8. Clauses 820.211(2)(a) and 820.221 require that at the time the visa application was made, and at the time of this decision, the applicant is the spouse or de facto partner of an Australian citizen or Australian permanent resident or an eligible New Zealand citizen. In the present case the applicant claims to be the spouse of the sponsor who is an Australian citizen.
9. 'Spouse' is defined in s.5F of the Act and provides that a person is the spouse of another where the two persons are in a married relationship. Persons in a married relationship must be married to each other under a marriage that is valid for the purposes of the Act, there must be a mutual commitment to a shared life as husband and wife to the exclusion of all others, the relationship must be genuine and continuing, and the couple must live together, or not live separately and apart on a permanent basis: s.5F(2)(a)-(d). In forming an opinion about these matters, regard must be had to all of the circumstances of the relationship. This includes evidence of the financial and social aspects and the nature of the parties' household and their commitment to each other as set out in r.1.15A(3), which is extracted in the attachment to this decision.

ARE THE PARTIES VALIDLY MARRIED?

10. If the parties are validly married, they may meet the requirements of a spousal relationship, but not a de facto relationship. The Tribunal has been provided with a copy of the parties' Marriage Certificate issued by the Registry of Births, Deaths and Marriages in Western Australia certifying the parties as married on 21 March 2015. On the evidence, the parties were married to each other under a marriage that is valid for the purposes of the Act as required by s.5F(2)(a).

ARE THE OTHER REQUIREMENTS FOR A SPOUSAL RELATIONSHIP MET?

11. The Tribunal has had regard to the evidence provided relating to the financial aspects of the relationship, including joint ownership of assets and joint liabilities, the extent of any pooling of financial resources, any legal obligations owed by the other party and any sharing of the day to day household expenses.
12. The parties have produced evidence of their joint Westpac account opened on 4 February 2015. Copies of the bank statement for the period February – August 2015, July - November 2016 and May – September 2017 have been produced reflecting regular cash deposits and everyday transactions.
13. The applicant initially moved into the sponsor's home as a carer for his father and disabled brother when they were visiting from Italy. The applicant has continued to live there after their relationship developed and subsequent marriage took place. The Tribunal is satisfied the applicant is financially supported by the sponsor who has his own business.
14. The Tribunal is satisfied based on the documentary evidence provided that the nature of the parties' financial arrangements is such that would indicate a genuine spousal relationship.
15. The Tribunal has had regard to the evidence as to the nature of the household including the parties' living arrangements, the caring of any children and any sharing of housework.
16. The parties' evidence is that they initially met socially but subsequently the sponsor asked if the applicant would move in as a carer for his elderly father and disabled brother while they were visiting from Italy. The parties state their feelings for each other developed after this and the applicant continued living in the sponsor's home. Both parties have provided signed statements regarding the division of labour within the house. The applicant has said she helps out in the sponsor's business with office administration and cleaning.
17. The parties have produced evidence they have purchased a dog together who appears extremely well cared for.
18. Evidence provided from the parties' GP indicates the applicant is pregnant with an expected delivery date in October 2017.
19. Several items of correspondence addressed to the parties both individually and separately at the same address in The Vines have been provided. Alinta energy have confirmed by letter that the applicant is an authorised contact as of 18 September 2017.
20. The Tribunal is satisfied based on the documentary evidence provided to it that the nature of the parties' household is an indicator of a genuine and continuing spousal relationship.
21. The Tribunal has had regard to the evidence provided as to whether the parties represent themselves to other people as being married to each other, the opinion of the parties' friends

and acquaintances about the nature of the relationship and any basis on which the parties plan and undertake joint social activities.

22. Substantial quantities of photos dated and annotated were provided to the Tribunal picturing the parties in a variety of different social settings since 2014 with different friends and family members. Photos of the parties' civil wedding were provided, together with many photos of their travels together. They have frequently travelled to see family and friends in both Italy and Malaysia.
23. Additionally, several Form 888 statutory declarations were provided by friends of the sponsor attesting to their belief in the strength and genuineness of the parties' relationship.
24. The parties clearly enjoy travelling together and socialising with friends and family both here and overseas.
25. Having considered the substantial amount of documentary evidence provided to it the Tribunal finds the evidence of the social aspects of the parties' relationship is an indicator of a genuine spousal relationship.
26. The Tribunal has had regard to the evidence provided in relation to the nature of the parties' commitment to one another including the duration of the relationship, the length of time they have lived together, the degree of companionship and emotional support they draw from each other and whether they see the relationship as long term.
27. The parties met socially in late 2013 through mutual friends. In January 2014 the sponsor asked the applicant to move in as a carer for his elderly father and disabled brother who were visiting from Italy. During that time the father became quite ill in hospital and the sponsor says he witnessed how caring and kind the applicant was towards his father in the hospital. The parties realised they had developed feelings for one another and the applicant moved into the sponsor's house at the end of January 2014 as his partner.
28. In November 2014 the sponsor proposed to the applicant and they married on 21 March 2015 at the sponsor's home. They went to Italy for their honeymoon and subsequently travelled to the applicant's home in Malaysia for a traditional Chinese wedding celebration with her family and friends.
29. Photographic evidence picturing these events over time were provided to the Tribunal.
30. A letter from their family doctor has confirmed the applicant is pregnant with their first child which is due in October 2017.
31. The parties have presented themselves through the documents produced as a deeply committed couple who are actively planning their future together. Having carefully considered all the documentary evidence provided the Tribunal is satisfied the parties' level of emotional commitment and degree of companionship and support to each other is an indicator of the genuineness of their spousal relationship.
32. Based on the evidence before it the Tribunal is satisfied the parties have a mutual commitment to a shared life together to the exclusion of all others. The Tribunal finds the parties are in a genuine and continuing relationship and that they live together and not separately and apart on a permanent basis.
33. On the basis of the above the Tribunal is satisfied that the requirements of s.5F(2) are met at the time of application.

34. The Tribunal finds that at the time of the application the applicant was the spouse of a person who is an Australian citizen, that the applicant was being sponsored by that person and the sponsor was not prohibited from being a sponsoring partner under cl.820.211(2B). The Tribunal finds that at the time the application was lodged the applicant was the holder of a substantive visa. Accordingly, the Tribunal finds that the applicant meets cl.820.211(2)(a), (c) and (d).
35. The Tribunal finds that the applicant continues to meet the requirements of cl.820.211(2) at the time of this decision. Therefore the applicant satisfies cl.820.221.
36. Given these findings the Tribunal is satisfied that at the time the visa application was made and at the date of this decision the parties were in a spousal relationship.
37. Given the findings above the appropriate course is to remit the application for the visa to the Minister to consider the remaining criteria for a Subclass 820 visa.

DECISION

38. The Tribunal remits the application for a Partner (Temporary) (Class UK) visa, with the direction that the applicant meets the following criteria for a Subclass 820 (Partner (Temporary)) visa:
 - cl.820.211(2) of Schedule 2 to the Regulations
 - cl.820.221 of Schedule 2 to the Regulations

Michelle East
Member

ATTACHMENT - EXTRACT FROM MIGRATION REGULATIONS 1994

1.15A SPOUSE

(1) For subsection 5F (3) of the Act, this regulation sets out arrangements for the purpose of determining whether 1 or more of the conditions in paragraphs 5F (2) (a), (b), (c) and (d) of the Act exist.

(2) If the Minister is considering an application for:

- (a) a Partner (Migrant) (Class BC) visa; or
- (b) a Partner (Provisional) (Class UF) visa; or
- (c) a Partner (Residence) (Class BS) visa; or
- (d) a Partner (Temporary) (Class UK) visa;

the Minister must consider all of the circumstances of the relationship, including the matters set out in subregulation (3).

(3) The matters for subregulation (2) are:

- (a) the financial aspects of the relationship, including:
 - (i) any joint ownership of real estate or other major assets; and
 - (ii) any joint liabilities; and
 - (iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and
 - (iv) whether one person in the relationship owes any legal obligation in respect of the other; and
 - (v) the basis of any sharing of day to day household expenses; and
- (b) the nature of the household, including:
 - (i) any joint responsibility for the care and support of children; and
 - (ii) the living arrangements of the persons; and
 - (iii) any sharing of the responsibility for housework; and
- (c) the social aspects of the relationship, including:
 - (i) whether the persons represent themselves to other people as being married to each other; and
 - (ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and
 - (iii) any basis on which the persons plan and undertake joint social activities; and
- (d) the nature of the persons' commitment to each other, including:
 - (i) the duration of the relationship; and
 - (ii) the length of time during which the persons have lived together; and
 - (iii) the degree of companionship and emotional support that the persons draw from each other; and
 - (iv) whether the persons see the relationship as a long term one.

(4) If the Minister is considering an application for a visa of a class other than a class mentioned in subregulation (2), the Minister may consider any of the circumstances mentioned in subregulation (3).